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No. 87-896

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM A. FOSTER, JR.,

Petitioner,

v.

JAMES R. PEDDICORD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether suit which resulted from a diving accident off a yacht in navigable waters is cognizable in admirably.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No._____

William A. Foster, Jr., Petitioner

v.

James R. Peddicord

* * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William A. Foster, Jr., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on August 26, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at Numbers 86-2663 and 87-2509 and is printed in Appendix 'A' hereto, infra, page 001. The judgment of the United States Court of Appeals for the Fourth Circuit is printed in Appendix 'A' hereto, infra, page 024. The Journal Entry of Judgment of the United States District Court for the District of Maryland is printed in Appendix 'A' hereto, infra, page 025.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit (Appendix 'A', infra, page 024) was entered on August 26, 1987. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether suit which resulted from a diving accident off a yacht in navigable waters is cognizable in admirably.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Constitution of the United States, Article III, Section 2, Clause 1, which provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall their Authority, --to all cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; - between citizens of different States, --between citizens of the same State claiming Lands under

> Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. (emphasis added).

STATEMENT OF THE CASE

The action was brought under Rule 9(h) of the Federal Rules of Civil Procedure, Admiralty and Maritime Claims, and pursuant to 28 U.S.C. Section 1333, Admiralty, Maritime and Prize Cases, which confers original jurisdiction over such cases to the Federal District Courts.

While there was a question of Statute of Limitations because this suit followed a Worker's Compensation Compromise and Settlement, this case is against a third party tort-feasor, James R. Peddicord.

The injuries sustained by the Petitioner were directly and proximately caused by the third party tort-feasor's (Peddicord's) acts and omissions as owner and operator of a vessel, who was supervis-

ing all activities aboard his vessel and by the unseaworthiness of that vessel.

In his Complaint, Petitioner alleged James R. Peddicord was negligent in the operation, management and navigation of the vessel in that he did not properly anchor the vessel under the existing conditions, that he did anchor and locate the vessel in a dangerous and unsafe location; that he failed to advised the Petitioner as to dangers which could be reasonably anticipated of waterborne activities in shallow water at the time of the occurrence; that he failed to exercise due care in directing the waterborne activities of the Petitioner as a passenger/invitee; that he failed to properly man or crew the vessel; that he failed to provide a safe landing from the vessel and a safe means to enter the water from the vessel, and that Peddicord failed to maintain a seaworthy vessel.

The vessel, in this instance, was a

26' Owens yacht called the "Hi Ho". At the time of the occurrence it was located in Stoney Creek; a tributary of the Chesapeake Bay and a body of navigable water.

At approximately 7:00 p.m. on July 3, 1983 Foster at the invitation of Peddicord, dove from the yacht with the expectation that the water was deep enough, as earlier that day he was invited to, and did dive, from approximately the same location. He suddenly struck ~~his~~ head on the bottom, fracturing his spine. Foster asserts that his injuries were caused as a direct and proximate result ~~of the~~ acts and omissions of Peddicord, who was the owner and operator of the yacht, who encouraged and supervised all waterborne activities, and who failed to warn Foster and the other guests of impending dangerous conditions, such as shallow water which Peddicord could and should have reasonably anticipated and/or detected.

Foster additionally asserts that Ped-

dicord did not properly anchor the vessel under the existing conditions; that he did anchor and locate the vessel in a dangerous and unsafe location which was navigational, operational and managerial error; that he failed to exercise due care in directing the waterborne activities of Foster as a passenger/invitee; he failed to properly man or crew the vessel, failed to provide a safe landing from the vessel and a safe means to enter the water from the vessel, all of which caused the "Hi Ho" to be unseaworthy at the time of the occurrence.

THE RULINGS BELOW

Peddicord filed an Amended Motion to Dismiss claiming the District Court lacked subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1). He claimed it was "merely fortuitous" that this injury occurred in navegable waters and not at a neighborhood swimming pool.

The District Court dismissed Foster's claim for unseaworthiness without a hearing, by Order, and the accompanying Memorandum stated "The Defendant [Peddicord] might have well have been estimating the depth of a swimming pool". The claim for negligence was left intact.

William Foster, Petitioner herein, appealed the dismissal of the case for lack of jurisdiction, to the United States Court of Appeals for the Fourth Circuit asserting that his claim does fall under the Admiralty jurisdiction of the District Court. The Court of Appeals for the Fourth Circuit, in their published opinion, stated "While the vehicle involved was a boat, we agree with the district court's conclusion that it might just as easily have been a fixed diving platform..." and as such, held that Foster failed to satisfy the "Nexus" requirement of the "Situs-Nexus test".

The Petitioner herein, William A. Foster, Jr., asserts that the courts below

erred in granting the third party tort-feasor Peddicord's Motion to Dismiss as to the claim of unseaworthiness because it is a well-settled principle of maritime law that a ship owner owes a duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew.

As Peddicord failed to warn his guests of the possible danger of diving in waters which he knew or had reason to know were shallow, he violated the following rule and regulation:

> "Navigational Rules for Harbors, Rivers, & Inland Waters," 33 U.S. Code Sections 151 - 232 particularly 33 U.S. Code, Section 121 which states in part:
>
> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect . . . to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of Seamen, or by the special circumstances of the case." (emphasis added)

1 U.S.C. Section 3 (1976) distinctly

mandates the word "vessel" to include every description of water craft or other artificial contrivance used or capable of use as means of transportation on water.

Admiralty and Maritime jurisdiction has been held to include yachts and small pleasure crafts. In 46 U.S.C. Section 740 the boundaries of Admiralty and Maritime jurisdiction are clearly set out:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person ... caused by a vessel on navigable water ..."

The "Situs" prong of the "Situs-Nexus" test is not contested. Both parties agree that the "Situs" requirement has been met. The "Nexus" is determined by "some relationship between a tort and traditional maritime activities involving navigation". The Wake of Executive Jet - a Major Wave or a Minor Ripple, 4 Mar.Law 54 at 72. The Petitioner asserts that anchoring in navigable water is a traditional role of

those operating vessels upon the water; thus falls under the traditional concept of maritime law. Anchoring is part of navigation, and it is precisely this role that creates the necessary "Nexus" to traditional maritime activity here. Peddicord additionally had a responsibility, as captain, to protect his passengers. This also is included in the traditional concept of maritime law. For these reasons the Petitioner asserts that he has met the "Nexus" prong of the "Situs-Nexus" test.

REASON FOR GRANTING THE WRIT

The Fourth Circuit Court of Appeals has rendered a decision on an important question of Federal Law, which has not been, but should be, settled by this Court.

The question of whether a suit which resulted from a diving accident off a yacht in navigable waters is cognizable in Federal admiralty law is of such importance

that it should be decided by the Supreme Court of the United States.

The lower district court stated that "It may be under some circumstances anchoring may constitute navigation" but did not give a hint of what "some circumstances" were being referred to.

Historically, the traditional standard used to determine a tort's maritime character was the 'locality of the wrong' test as clearly stated by Justice Story in Thomas v. Lane 33 F.Cas. 957 (1813):

> "the jurisdiction of the admiralty is exclusively dependent upon the locality of the act" Ibid at 960.

This locality test was expanded to include all navigable waters in The Genesse Chief v. Fitzbugh, 12 How. 443 (1852). It was not until the 1972 Supreme Court decision of Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249, that this maritime locality test was questioned by the Judi-

cial branch.[1]

Congress, on the other hand, recognized the limitations to the locality test and, in 1948, expanded admiralty jurisdiction, in the Extention of Admiralty Jurisdiction Act to include all cases of damage or injury caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consumated on land. See 46 U.S.C. 740 (1976).

This Honorable Court in Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249, concluded that, with respect to aviation accidents on off-shore waters, admiralty jurisdiction would apply only when the accident bore a significant relation

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1. The Court acknowledged that the locality rule made sense when the tort involved a vessel but became strained when an aircraft was involved 409 U.S. at 266.

ship to traditional maritime activity[2] and that in the absence of legislation to the contrary, there is admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between ports within the continental United States.[3]

In 1982, this Court, in Foremost Ins. Co. v. Richardson, 102 S. Ct. 2654, found that traditional maritime activity was not synonymous with commercial maritime activity and quoted Executive Jet, stating that maritime laws traditional concern is with the

> "Navigational rules that govern...all vessels, both commercial and non-commercial" 409 U.S. at 270.

This Court clearly supported the broad con-

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2. Executive Jet Aviation Inc. v. City of Cleveland, Supra p. 268.

3. Ibid, page 274.

struction of Federal interest which results by the intermingling of non-commercial with commercial activity and declared that the primary Federal interest in subjecting vessel operators on navigable waters to "uniform" rules of conduct cannot be limited to vessel operators engaged in commercial maritime activity. 102 S. Ct. at 2658. Therefore, in Foremost Ins. Co. v. Richardson, Supra, admiralty jurisdiction was found to exist in a case involving a collision between two pleasure boats on navigable waters and the required significant relationship with traditional activity was found to be present.

This Court emphasized, in Foremost Ins. Co., that it's decision was consistent with the statutory definition of the term 'vessel', the Federal 'Rules of the Road' enacted to promote safe navigation and the Extension of Admiralty Jurisdiction Act.

The required significant relationship with traditional activity is also known as

the "nexus" requirement. This requirement was held to be satisfied in the Fourth Circuit case of Oliver by Oliver v. Hardesty, 745 F.2d 317 (1984) where a swimmer was injured because of negligent operation of a 19' pleasure boat.

In the Fourth Circuit case of Souther v. Thompson, 754 F.2d 151 (1985), admiralty jurisdiction was denied because the Plaintiff, a water-skier, "failed to make any factual allegations that the operator of the boat had violated a navigational rule..." 754 F.2d at 153. Instead the Plaintiff alleged negligent operation of the vessel involved. Five months later the Fourth Circuit, in Hogan v. Overman, 767 F.2d 1093 (1985), set out, at footnote 2, that they "...now hold that admiralty jurisdiction does reach such claims when the negligence alleged is navigational error." (emphasis added).

Accordingly, that court found the "nexus" requirement was met, and upheld ad-

miralty jurisdiction in Hogan, which also involved an injured water-skier. The opinion in Hogan referred to Foremost Ins. Co. and stated:

> This case, like Foremost involves an alleged navigational error - 'the negligent operation of a vessel on navigable waters,' 457 U.S. at 674, 102 S. Ct. at 2658 - and therefore the district court had admiralty jurisdiction. The complaint, though unspecific, alleges negligent operation of a motorboat, which . . . can be construed as a general allegation of navigational error. Such a complaint is not vulnerable to a motion to dismiss for lack of jurisdiction. Hogan, Supra at 1094.

Petitioner asserts that his claim does state an allegation of operational, navigational and managerial error on the part of Peddicord, regarding a yacht in navigable waters. Peddicord had a duty to know or should have known the depth of the water he was achoring his vessel in, before he invited his guests to again dive and swim.

Foster, Petitioner herein, stresses

that the gravamen of his claim was the negligent navigational, operational and managerial act of anchoring the vessel by Peddicord. The courts below have ignored his claim and stated that "the gravemen of Foster's claim is...[Peddicord's] act of permitting [Foster] to dive into shallow waters."

Furthermore, the Fourth Circuit, in their opinion below of Foster v. Peddicord, discussed the "nexus" requirement and said, at footnote 3; "We do not suggest that the act of diving from a boat could never provide a nexus for the exercise of admiralty jurisdiction. Under certain circumstances this activity could bear a relationship to navigational conduct." Again the 'certain circumstances' are not clear.

The Federal interests are only fully served if all operators of vessels are bound to the same Rules and Regulations. To rectify the confusion of whether the act

of anchoring a vessel is sufficiently related to traditional maritime activity to constitute satisfying the 'nexus' requirement. Foster petitions this Honorable Court to grant this writ.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certionari should be granted.

Respectfully submitted,

November 20, 1987

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2663

WILLIAM A. FOSTER, JR.

Plaintiff-Appellant

and

INSURANCE COMPANY OF NORTH AMERICA

Plaintiff

v.

JAMES R. PEDDICORD

Defendant-Appellee

No. 87-2509

WILLIAM A. FOSTER, JR.;
INSURANCE COMPANY OF NORTH AMERICA

Plaintiff-Appellee

v.

JAMES R. PEDDICORD

Defendant-Appellant

001

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-86-1969)

Argued: June 3, 1987

Decided: August 26, 1987

Before SPROUSE and WILKINS, Circuit Judges, and MACKENZIE, Senior United States District Judge of the Eastern District of Virginia, sitting by designation.

Joseph Francis Lentz, Jr. (Lentz, Hooper, Jacobs & Blevins, P.A. on brief); Thomas A. Montminy (Douglas B. Schoettinger; Smith, Somerville & Case on brief) for Appellant; William Gregory Montgomery; Thomas B. Eastman; Randall C. Coleman; Ober, Kaler, Grimes & Shriver on brief) for Appellee.

WILKINS, Circuit Judge:

William A. Foster, Jr. (Foster) appeals the dismissal by the district court of his admiralty claim against James R. Peddicor((Peddicord) for lack of subject matter jurisdiction. Peddicord appeals the denial of his motion to dismiss Foster's remaining diversity claim and the subrogation claim of Insurance Company of North American (INA) as time-barred. We affirm.

I.

On July 3, 1983 Foster was a guest aboard a pleasure boat owned by Peddicord for a work-related recreational outing on a tributary of the Chesapeake Bay. During the outing Peddicord anchored the boat, struck bottom and was injured. On June 2, 1986 Foster reached an "Agreement of Final Compromise and Settlement" with his employer on a workmen's compensation claim arising from his injury. The claim was paid the same day by the employer's compensation carrier, INA.

On June 18, 1986 Foster filed suit against Peddicord in federal district court, alleging the court's jurisdiction to be based on admiralty and diversity. INA filed an intervening subrogation claim on August 13, 1986, for the monies paid to Foster. On September 10, 1986, after the Maryland three-year statute of limitations had run, Peddicord filed a motion to dismiss both complaints, contending that the claims were time-barred. On September 23, 1986 he filed an amended motion to dismiss on grounds that there was no admiralty jurisdiction. The motion was granted as to the contention that there was no admiralty jurisdiction, but denied as to the statute of limitations argument. The district court then certified its rulings for an interlocutory appeal pursuant to 28 U.S.C.A. Section 1292(b) (West Supp. 1987).

II.

Peddicord contends that the district court erred in not dismissing the

negligence claim of Foster, as well as INA's related subrogation claim, because the Maryland statute of limitations expired as to both Plaintiffs before a claim was properly filed. The Maryland statute of limitations, applicable to the instant action, allows a plaintiff to file suite within three years from the date he knew, or should have known, of the wrongs underlying his claim. Md. [Cts. & Jud. Proc.] Code Ann. Section 5-101 (1974, 1984 Repl. Vol.); see also Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677, 680 (1981).

It is uncontested that Foster filed a complaint on June 18, 1986 before the limitations period expired on July 3, 1986. However, it was also filed within two months of the settlement and award under the workmen's compensation claim against his employer. Peddicord thus argues that under Md. Ann. Code art. 101, Section 58 (1957, 1985 Repl. Vol.), as interpreted by the courts of Maryland, an employer or its

insurer (here, INA) has the "exclusive" right to file an action during the two months immediately following settlement of a workmen's compensation claim. The pertinent portion of the Maryland statute reads a follows:

> Where injury or death for which compensation is payable under this article was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee ... may proceed either by law against that other person to recover damages or against the employer for compensation under this article ... and if compensation is claimed and awarded or paid under this article, any employer, if he is self-insured, [or] insurance company ... may enforce for their benefit, as the case may be, the liability of such other person; provided, however, if damages are recovered in excess of the compenstion already paid or awarded to be paid under this article, ... any such excess shall be paid to the injured employee.... If any such employer, [or] insurance company ... shall not, within two months from the passage of the award of this Commission, start proceedings to enforce the liability of such other person, the injured employee ... may enforce the liability of such other person, provided, however, that if damages are recovered ... the employer, [or] insurance company ... shall be reimbursed for the compensation already paid or

awarded....

Md. Ann. Code art. 101, Section 58.

Peddicord argues that because Foster brought suit at a time during which the insurer or employer had an "exclusive" right to do so, the filing was a nullity. As the issue is framed by Peddicord in his brief, "[t]he complaint ... should have been dismissed since at the time the action was filed [Foster] had no legal capacity to file the suit" and the statute of limitations expired before an action as timely refiled by either Foster or INA.

Peddicord relies primarily on the recent case of Smith v. Bethlehem Steel Corp., 303 Md. 213, 492 A.2d 1286 (1985). Language from that opinion indicates that if a third-party action is not brought until after an award of compensation, the subrogation priorities set forth under Section 58 above mean that "the right of action given by the section to the employer or insurer should be exclusive for two

months after the awarded of the [Commission]." Smith 492 A.2d at 1290 (quoting State ex rel. Mayor and City Council of Baltimore v. Francis, 151 Md. 147, 152, 134 A. 26, 28 (1926)). The interpretation that Peddicord would have us give to this language is, under the circumstances, unsupportable.

In Smith the Maryland Court of Appeals was called upon in to interpret the second paragraph of Section 58, which reads:

> When any employee has a right of action under this section against a third party, the period of limitations for such action, as to such employee, shall not begin to run until two months after the first award of compensation made to such employee under this article, and this section shall apply to past and future rights of action under this section.

Md. Ann. Code art. 101, Section 58 (emphasis added). This portion of the statute appears to provide substantially different limitation periods for the same injury, depending upon (1) whether the accident was or was not work-related, (2)

whether and when an injured party filed a claim for workmen's compensation, and (3) whether that claim was successful. The plaintiffs in Smith essentially argued that the statute did in fact provide for such different periods of limitation. Smith, 492 A.2d at 1291-94. The Maryland court rejected this reading of the statute and instead construed the paragraph as merely a "tolling" provision to recoup the time an employee might lose as a result of not initiating an action within the two-month period after a compensation claim was paid:

> We therefore conclude that the limitations problem address by Section 58 Paragraph 2 is that limitations on a cause of action which accrued upon consummation of the tort of discovery could expire during the two months following award while the employer has the exclusive right to institute the third-party action. During that two months the employer might fail to sue despite the employee's desire to sue. We therefore construe the second paragraph to effect, "as to such employee," a tolling of the otherwise applicable statute of limitations during the two months after award when the employee is excluded from instituting a third-party action. Thus "the period of limitations for

such action, as to such employee, shall not [resume or] begin to run [again] until two months after the first award of compensation made to such employee under this article...."

Smith, 492 A.2d at 1294.

In this case, it is the converse of the situation discussed in Smith that has occurred. INA, the insurer, did not "fail to sue despite the employee's desire to sue." Rather, Foster, the employee, initated the action for the benefit of both himself and the insurer in order to preserve rights and priorities that the Maryland statute was plainly intended to protect:

> [P]resent Section 58 is for the benefit of the employer or insurer and the injured employee or his dependents; it is not for the benefit of the negligent third party. The statute does not create the right of action, but merely creates or preserves the right of subrogation for the benefit of the employer and employee as their interests may appear. The procedural priorities established are for the protection of those interests alone.
>
> Because the claim of the employer against the third party is by way of subrogation to the rights of the

> injured worker, the employer has no independent standing to sue the third party. Section 58 seems expressly to require compensation to have been both "claimed and awarded or paid" before standing can arise in the employer. The injured worker, however, may institute a third-party action prior to an award of compensation without foregoing all right to compensation. In cases where the worker files a third-party action prior to an award of compensation, "[t]he purpose of [present Section 58] is fully gratified so long as the employer or insurer is afforded an opportunity to intervene and control the conduct of the action, to the same extent as if they had instituted it, and obtain reimbursement out of any recovery."

Smith, 492 A.2d at 1290 (citations omitted) (quoting Johnson v. Miles, 188 Md. 455, 460, 53 A.2d 30, 32 (1947)) (emphasis added).

Clearly an insurer or employer could expressly or by implication waive the right to sue during the two-month period of "exclusivity," choosing instead to intervene in the proceedings brought by the employee. As Smith plainly states, the right is for the benefit of employer or insurer (and employees and their dependents),

not for the benefit of the third-party tortfeasor and, as with any right, the party who holds it may choose to forego its exercise, or to determine the manner in which it is exercised.

In the instant case, we need not address those circumstances under which it might be reasonable to infer that an insurer (or employer) has tacitly waived its right to sue. After Foster filed his action, INA dispelled any doubt as to its position when it filed a motion to intervene in the pending proceedings. Therefore, Foster's action on June 18, 1986, ratified by the intervention of INA in the proceedings, was proper and was brought in timely fashion before the statute of limitations had expired. Any other conclusion would be inconsistent with the purposes of statutes of limitation. Decker v. Fink, 47 Md. App. 202, 422 A.2d 389, 391-92 (1980).

Peddicord also argues that because

INA's intervening complaint was filed after expiration of the original or the "tolled" limitations period, INA's claim too should be time-barred. This argument is equally without merit. Because INA's action in intervention, filed on August 13, 1986, was based upon its subrogation interest in Foster's claim, there was a community of interest between the claims of INA and Foster sufficient to allow INA's filing to "relate back" to the claim initiated by Foster. Marsh v. Foster, 97 F.2d 327, 330 (4th Cir. 1938); United States v. Middleton, 3 F.2d 384, 392 (4th Cir. 1924), cert. denied, 267 U.S. 603 (1925); DeFranco v. United States, 18 F.R.D. 156, 159-62 (S.D. Calif. 1955). Therefore, the claim of INA is deemed to have been timely filed.

III.

Foster argues that the district court erred in dismissing his claim of unseaworthiness for lack of admiralty jurisdiction. We disagree.

Article III, section 2 of the United States Constitution provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." However, the framers of the Constitution did not undertake to define the precise limits of admiralty and maritime jurisdiction or to lay down criteria for drawing the boundaries between admiralty and local law, but instead left this to judicial interpretation consistent with the purposes of article III, section 2. Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43 (1934). The federal judiciary has therefore fashioned a large part of the existing law that governs admiralty.

In Executive Jet Aviation v. Cleveland, 409 U.S. 249 (1972), the Supreme Court departed from the strict "historic view" that location or "situs" alone determines admiralty jurisdiction, and concluded that a mechanical determination of whether

the wrong was "located" on navigable waters had given rise to unpredictable and "absurd" results:

> Other serious difficulties with the locality test are illustrated by cases where the maritime locality of the tort is clear, but where the invocation of admiralty jurisdiction seems almost absurd. If a swimmer a a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains water damage from being dropped into a harbor by a land-based crane, a literal application of the locality test invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases such as these, some courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation. Other courts, however, have held in such situations that a maritime locality is not sufficient to bring the tort within federal admiralty jurisdiction, but that there must also be a maritime nexus--some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters.

Executive Jet, 409 U.S. at 255-56 (footnote omitted) (emphasis added).

The Court in Executive Jet adopted what is now known as the "nexus" test of admiralty jurisdiction. It concluded that the fact that a jet fell into navigable waters, rather than upon land, "alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases." Id. at 261. In doing so, the Court relied considerably on the reasoning of the Sixth Circuit in Chapman v. City of Grossee Pointe Farms, 385 F.2d 962 (6th Cir. 1967), which had applied the test to deny admiralty jurisdiction to a swimmer injured at a public beach.

After Executive Jet there were questions as to the scope of its application. The opinion appeared in part to be a narrow one, limited to aviation tort cases. There was also a question as to whether the "maritime activity" involved had to be of a "commercial" nature, as had previously appeared to be the general rule. See Foremost Insurance Co. v. Richardson, 457

U.S. 668, 680 (1981) (Powell, J., dissenting).

In Richards v. Blake Builders Supply, 528 F.2d 745 (4th Cir. 1975), this court returned to the issues of Executive Jet in two consolidated appeals. These cases arose from accidents involving pleasure craft, one in which an explosion on board a boat after a stop for refueling killed one person and seriously injured others, and the other in which a boat in operation suddenly swerved into the bank of a river injuring an occupant. Although the vessels involved were purely recreational, this court concluded that there was admiralty jurisdiction:

> In these cases, the business of commercial shipping has no presence, but these small pleasure boats were certainly vessels in navigation, and the controversy arose out of their navigation. There is thus a maritime connection.... [T]he operation of these boats was within the admiralty jurisdiction and the new rule as stated in Executive Jet.

Richards, 528 F.2d at 749 (emphasis added).

In Foremost, a case which arose from a collision between two pleasure boats operating on a navigable river, the Supreme Court clarified that the "nexus" test is not limited only to aviation tort cases. The Court further held that admiralty jurisdiction could be extended to cases of craft involved in non-commercial activity if the vessels were operating upon navigable waters and if the activity in question otherwise constituted traditional maritime activity. Foremost, 457 U.S. at 674. The opinion stated, however, that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction," Id. at 675, N.5; "claims by swimmers injured by ... submerged objects in shallow waters," Id. at 674, n.4, gained no more ground under the Court's analysis in Foremost than under Executive Jet.

Since Foremost, this court has stated that in cases involving pleasure craft "the

proper emphasis is on the navigation of the pleasure boat involved." Oliver by Oliver v. Hardesty, 745 F.2d 317, 320 (4th Cir. 1984). From this emerged the language upon which Foster now erroneously relies. In Souther v. Thompson, 754 F.2d 151, 153 (4th Cir. 1985), this court indicated that it is not sufficient for a claimant to "bootstrap" his way into federal court by pretextual allegations of navigational error:[1]

Souther, 754 F.2d at 153.

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1. Our decision in Hogan v. Overman, 767 F.2d 1093 (4th Cir. 1985), is inapposite to the facts of this case. In Hogan, defendant's counsel conceded that the averment in question could be construed as a general allegation of navigational error, Id. at 1094, and the plaintiff supplemented his pleading with an affidavit that detailed specifics of the manner in which the boat was operated negligently. Id., n.1. Here, as in Souther, Foster has attempted to recite only a litany of omissions in an effort to create a federal claim from a particular class of injury, swimmers hitting submerged objects, that has a maritime locality, but "absolutely no connection to maritime activity." Hogan, 767 F.2d at 1094 (quoting Foremost, 457 U.S. at 674, n.4).

Souther, 754 F.2d at 153.

The recent decision of this court in Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir. 1985), further guides application of the "nexus" test. Under the analysis in Oman, four factors should be considered in determining whether the alleged wrongs satisfy the nexus test of Executive Jet:

(1) the functions and roles of the parties;

(2) the type of vehicles and instrumentalities involved;

(3) the causation and type of injury; and

(4) traditional concepts of the role of admiralty law.

Oman, 764 F.2d at 230.

Foster's position is not enhanced by virtue of the trial judge's decision not to articulate his formal analysis using this test. Our review of the facts clearly shows that the nexus requirement was not satisfied. See Hassinger v. Tideland

Electric Membership Corp., 781 F.2d 1022, 1028 (4th Cir. 1986).

As indicated previously, the relationship of the parties was primarily recreational, with business-related overtones. Peddicord was the owner of a pleasure craft and Foster was his guest. To move from this to an analogy of the relationship between a captain of a merchant vessel and his passengers or crew members is simply inappropriate under these circumstances.

While the vehicle involved was a boat, we agree with the district court's conclusion that it might just as easily have been a fixed diving platform for the purpose to which it was put. As such, the structure and the accident "had no more connection with the ordinary stuff of admiralty than do accident on piers." Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352, 360 (1969) (stationary drilling platforms did not constitute "vessels" subject to admiralty jurisdiction).

The injury in this case occurred when Foster dove from the boat and hit bottom in shallow water. To conclude that the location where Peddicord parked his boat constituted "navigational error" and that this in turn was the cause of the injury, would reflect neither a reasonable definition of navigation nor common sense. See The Silvia, 171 U.S. 462, 466 (1898).

Finally, we consider the traditional concepts of the role of admiralty law, "the most important factor" according to our decision in Oman, 764 F.2d at 231. Admiralty has been traditionally concerned with federalism, uniformity, and the regulation of navigable waterways, as well as the specifics of "maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage." Executive Jet, 409 U.S. at 270.

Reduced to its essence, this case is about swimming and diving, and an unfor-

of a recreational outing in which a pleasure boat was used as a diving platform. It is not about piloting, shipping, or navigational error, or other aspects of traditional maritime activity. There is simply no predicative relationship upon which an otherwise typical tort claim[2]

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2. Because there is diversity between the original parties to the action, it would not be entirely accurate to describe the matter as essentially a state tort claim. However, on remand the district court will of course apply the substantive law of the forum state of Maryland as to the negligence action. Thus, for all practical purposes the claim litigated will be of state rather than federal origin.

At oral argument counsel for Foster conceded that the reason for attempting to come within the court's admiralty jurisdiction is that Maryland follows the doctrine of contributory negligence as a bar to recovery, see Harrison v. Montgomery County Board of Education, 295 Md. 442, 456 A.2d 894 (1983), while in admiralty the doctrine of comparative negligence prevails. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). The allegations of Peddicord's answer, which if true would apparently be of some concern to Foster at trial, at least appear to raise signigicant issues of Foster's own contributory negligence in bringing about his injuries. Thus, under traditional admiralty concerns of federalism, it would seem inappropriate for us to encourage forum-shopping by the manner in which jurisdictional rules are applied.

may properly be described as relating to "matters with which admiralty is basically concerned." Executive Jet, 409 U.S. at 270. We hold that these circumstances do not invoke federal admiralty jurisdiction.[3] The decision of the district court in dismissing the unseaworthiness claim is accordingly affirmed.

AFFIRMED AND REMANDED.

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3. We do not suggest that the act of diving from a boat could never provide a nexus for the exercise of admiralty jurisdiction. Under certain circumstances this activity could bear a relationship to navigational conduct.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM A. FOSTER, JR.	*
Plaintiff	*
v.	*
JAMES R. PEDDICORD	*Civil No.:
Defendant	*JFM-86-1969

****

INSURANCE COMPANY OF NORTH AMERICA	*
	*
Intervening Plaintiff	*
v.	*
JAMES R. PEDDICORD	*
Defendant	

****

MEMORANDUM

1. Plaintiff having filed a Motion to Amend Interlocutory Order to Include Statement Prescribed By USCS (sic) section 1292(b),

2. Defendant having filed a Motion to Enter Notice of Appeal Or In The Alternative To Amend Interlocutory Order,

3. This Court, while reserving judgment on defendant's contention that his mo-

tion to dismiss Count I is immediately appealable as of right under 28 U.S.C. section 1292(a)(3), finding that the portion of its November 3, 1986 order denying defendant's motion to dismiss Count I involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the portion of that order may materially advance the ultimate termination of the litigation, and

4. This Court finding that there is no just reason for delay in appealing the portion of its November 3, 1986 order granting defendant's motion to dismiss Count II, it is this 2nd day of December 1986

ORDERED

A. This Court's order of November 3, 1986 is hereby amended to include the express determinations made in the introductory paragraphs hereof pursuant to 28 U.S.C. section 1292(b) and Fed. R. Civ. P.

54(b);

B. The rulings made in the November 3, 1986 order denying defendant's motion to dismiss Count I and granting defendant's motion to dismiss Count II are confirmed; and

C. Final judgment in favor of defendant as to the claim asserted by plaintiff in Count II is hereby directed.

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM A. FOSTER, JR.	*	Civil No.:
v.	*	JFM-86-1969
JAMES R. PEDDICORD	*	

****

MEMORANDUM

This is an action for negligence and unseaworthiness. Plaintiff was seriously injured when, while being entertained for business purposes on defendant's yacht, he dove into a tributary of the Chesapeake Bay and hit the bottom. Defendant has filed a motion to dismiss which raises three issues: (1) whether Foster's action should be dismissed because it was instituted during a two month period when under section 58 of Maryland Workmen's Compensation law only his employer's compensation insurance carrier was entitled to institute suit; (2) whether an intervening complaint filed by Insurance Company of North America (the compensation carrier of Foster's

employer) is time-barred; and (3) whether this case falls within this Court's admiralty jurisdiction.

I.

Foster suffered his injuries on July 3, 1983. Shortly thereafter, he filed a workmen's compensation claim against his employer. The claim was initially denied by the Workmen's Compensation Commission but on May 27, 1986 Foster and his employer entered into a settlement agreement which was approved by the Commission on June 2, 1986. INA paid Foster under the agreement the same day. On June 17, 1986 INA filed an intervening complaint claiming as subrogee the monies which it has paid to Foster.

Maryland Code Ann. Art. 101, section 58 provides in pertinent part as follows:

> Where injury or death for which compensation is payable under this article was caused under circumstance creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee...may proceed either by law against that other person to recover

> damages or against the employer for compensation under this article...and if compensation is claimed and awarded or paid under this article, any employer, if he is self insured, insurance company,...may enforce for their benefit, as the case may be, the liability of such other person; provided, however, if damages are recovered in excess of compensation already paid or awarded to be paid under this article,...any such excess shall be paid to the injured employee....If any such employer, insurance company...shall not, within two months of the passage of the award of this Commission, start proceedings to enforce the liability of such other person, the injured employee...may enforce the liability of such other person, provided however, that if damages are recovered...the employer, insurance company,...shall be reimbursed for the compensation already paid or awarded... .
>
> When any employee has a right of action under this section against a third party, the period of limitations for such action, as to such employee, shall not begin to run until two months after the first award of compensation made to such employee under this article... .

The Maryland Court of Appeals has recently interpreted this language in Smith v. Bethlehem Steel Corp., 303 Md. 213, 492 A.2d 1286 (1985). Under Smith it is clear that an employee may institute a third

party action at any time prior to an award of payment of compensation or after two months have passed from the date of the award or payment. During the two month period after the award or payment the employee or insurer has the exclusive right of action. The otherwise applicable limitations period is tolled during the two months after the award or payment of compensation, at least as to the employee's claim. One of the issues in this case is the extent to which there is tolling as to the employer's or insurer's claim.

Defendant makes two arguments. First, he contends that Foster's action was premature because, having been filed on June 17, 1986, it was filed within two months of June 2, 1986, the date on which the Workmen's Compensation Commission approved the settlement agreement and INA paid Foster. Second, he contends that INA's claim is time-barred because it filed its intervening complaint on August 13, 1986,

more than three years after Foster sustained his injuries and more than two months after it paid Foster under the settlement agreement.

Although each of the arguments is arguably supportable under the statutory language, each of them would defeat the remedial legislative purpose. Section 58 does establish a two month period after an award or payment in which the employer or insurer has the exclusive right to bring an action. However, this provision "is for the benefit of the employer or insurer and the injured employee . . . ; it is not for the benefit of the negligent third party." Johnson v. Miles, 188 Md. 455, 460 53 A.2d 30, 32 (1947). Here, INA does not complain of Foster's instituting this suit within the two month exclusivity period. To the contrary, INA has ratified Foster's institution of the suit by filing an intervening complaint of its own, and it has become his ally in the litigation. To dis-

miss this action (which would have the effect of permanently non-suiting both Foster and INA) would benefit solely defendant, whose sole legally cognizable right - to have a claim asserted against it within three years plus two months after the occurrence - has been fully protected both by the filing of Foster's initial complaint on June 17, 1986 and by INA's intervening complaint on August 13, 1986.

By the same token there is no sensible reason to overcomplicate the legislative scheme by holding, as defendant suggests, that the time for an employer or insurer (as opposed to the employee) to bring a third party action is limited to two months after the award or payment of compensation is made, in the event that the otherwise applicable statute of limitations expires during the two month period. On such arcane distinctions lawyers alone thrive. Smith holds that the limitations period is tolled during the two months after the

award or payment of compensation and that it does not begin to run again until after the two month period has expired. While Smith involved an employee's claim, the Court said nothing to suggest that a different rule applies to an employer's or insurer's claim. To the contrary, the Court expressly stated that after the two month exclusivity period has expired, the right of action of the employer or insurer is "concurrent with the similar right conferred upon the injured employee." 492 A.2d at 1290.[4]

See also State v. Francis, 151 Md. 147, 134 A. 26 (1926).

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4. Foster also argues that the settlement agreement did not constitute an "award" within the meaning of section 58. That is itself a highly questionable proposition. See, e.g., Simms v. First National Bank, 42 Md. App. 309, 400 A.2d 13 (1979); Dyson v. Pen Mar Co., 195 Md. 107, 73 A.2d 4 (1950). In any event, section 58 refers to "award or payment" and here there is not question but that INA made a payment on June 2, 1986, the same day on which the Commission approved the settlement agreement.

II.

Foster's claim for unseaworthiness depends upon the invocation of this Court's admiralty jurisdiction. In order for admiralty jurisdiction to exist, the alleged wrong must (1) occur on or over navigable waters, and (2) bear a significant relationship to traditional maritime activity. See Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249 (1972). Here, there is no dispute that the first of these conditions, the so called "situs requirement," has been met. However, it is equally clear that the second condition, the "nexus" requirement, has not been met.

The Fourth Circuit had made clear that in cases involving pleasure craft "the key to admiralty jurisdiction" is an allegation of "a navigational error." See, e.g., Souther v. Thompson, 754 F.2d 151, 153 (4th Cir. 1985); Hassinger v. Tideland Elec. Membership Corp., 781 F.2d 1022 (4th Cir.

1986); Hogan v. Overman, 767 F.2d 1093 (4th Cir. 1985); Oliver by Oliver v. Hardesty, 745 F.2d 317 (4th Cir. 1984). Foster has alleged that defendant was "negligent in the operation, management and navigation" of his yacht " in that he did not properly anchor the vessel under existing conditions, that he did anchor and locate the vessel in a dangerous and unsafe location." It may be that under some circumstances anchoring may constitute navigation. In this case, however, the gravamen of Foster's claim is not the act of anchoring but the act of permitting him to dive into shallow water. Under what were virtually the same circumstances Judge Young has held that the nexus requirement has not been met. See Smith v. Knowles, Civil Action No. 86-699 (D. Md., September 8, 1986). As Judge Young noted "the defendant's estimate of the water's depth did not affect the navigation of the boat. The defendant might have well have been estimating the

depth of a swimming pool."

A separate order is being entered herewith denying defendant's motion to dismiss Count I (the claim for negligence) and granting the motion as to Count II (the claim for unseaworthiness).

Date: November 3, 1986

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM A. FOSTER, JR.	*	
v.	*	Civil No.:
JAMES R. PEDDICORD	*	JFM-86-1969

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ORDER

For the reasons stated in the memorandum entered herein, it is this 3rd day of November 1986

ORDERED

1. Defendant's motion to dismiss Count I is denied; and

2. Defendant's motion to dismiss Count II is granted.

J. Frederick Motz
United States District Judge

APPENDIX B

STATUTES INVOLVED

1 USCS Section 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(July 30, 1947, ch 388, Section 1, 61 Stat. 633.)

28 USCS Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be review by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the united States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the

Federal questions presents:

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, Section 1, 62 Stat 928).

28 USCS Section 1333. Admiralty, maritime and prize cases. The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(June 25, 1948, ch 646, Section 1, 62 Stat. 931; May 24, 1949, ch 139, Section 79, 63 Stat. 101.)

33 U.S.C. Section 221 Usual additional precautions required generally (article 29)

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(June 7, 1897, ch 4, Section 1, 30 Stat. 102.)

46 USC Section 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit by be brought in rem

or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act [46 USCS Appx. Sub-Section 781 et seq.] or Suits in Admiralty Act [46 USCS Appx. Sub-Section 741 et seq.], as appropriate, shall constitute the exclusive remedy for all causes of action arising after the date of the passage of this Act [enacted June 19, 1948] and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

(June 19, 1948, ch 526, 62 Stat. 496.)